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October 5, 2007

VIA HAND DELIVERY

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U.S. Courthouse
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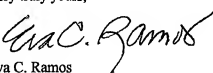
Re: *Encyclopaedia Britannica, Inc. v. Magellan Navigation, Inc., TomTom, Inc., and American TV & Appliance of Madison, Inc.*; Civil Action No. 1:07-cv-787 LY; in the U.S.D.C. for the Western District of Texas, Austin Division;

Dear Clerk Putnicki:

Enclosed for filing in the above-entitled and numbered cause, please find an original and two copies of **Defendants' Motion for Summary Judgment of Invalidity and an Order Setting the Effective Filing Date of U.S. Patents 7,051,018 and 7,082,437**, proposed **Order**, and **Appendix** for filing in connection with the above-referenced matter. We will send a courier to pick up our file-marked copy on Monday.

By copy of this letter, counsel of record is being served this date with a copy of the enclosed pursuant to the certificate of service. Thank you for your assistance in this regard.

Very truly yours,


Eva C. Ramos

/lab
Enclosures

**ENCYCLOPAEDIA BRITANNICA,
INC.,**

Y.

**MAGELLAN NAVIGATION, INC.,
TOMTOM, INC., and AMERICAN
TV & APPLIANCE OF
MADISON, INC.,**

Defendants.

CIVIL ACTION NO. 1:07-cv-787 LY

October 5, 2007

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INTRODUCTION

Plaintiff Encyclopaedia Britannica, Inc. ("Britannica") asserts U.S. Patents 7,051,018 ("the '018 Patent") and 7,082,437 ("the '437 Patent") (together, the "Patents-in-Suit") against all Defendants. Although Britannica filed the applications that became the Patents-in-Suit in June 2005, Britannica maintains that the Patents-in-Suit are continuations of applications that Britannica filed earlier, including the application that became U.S. Patent No. 5,241,671 ("the '671 Patent"),¹ which it filed on October 26, 1989, and U.S. Application Serial No. 08/113,955 ("the '955 Application"), which Britannica submitted to the Patent Office on August 31, 1993. This priority date claim is critical to Britannica's case because, without the benefit of the October 26, 1989 date, the Patents-in-Suit are invalid due to Britannica's own published prior art.

To benefit from an earlier filing date, a continuation application must meet certain strict statutory requirements set forth in 35 U.S.C. § 120. Because the '955 Application fails to meet these requirements, the Patents-in-Suit have an effective filing date no earlier than February 28, 1994. As a result, the scope of the prior art to the Patents-in-Suit is significantly larger than it would be if Britannica had complied with the statutory requirements for claiming priority to the '955 Application. Indeed, one of Britannica's own publications is prior art that undisputedly renders the Patents-in-Suit invalid.

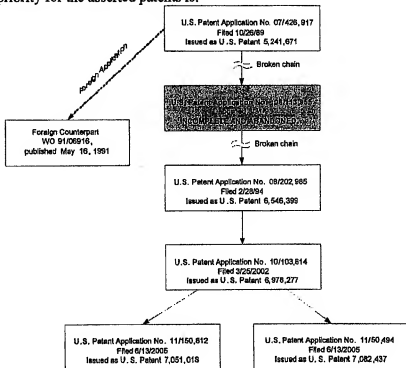
Because the public record clearly and indisputably demonstrates these points, the Court should enter summary judgment accordingly. Fed. R. Civ. P. 56(b). Defendants Magellan Navigation, Inc., and TomTom, Inc. respectfully submit that the Court should resolve these

¹ Britannica has asserted the '671 Patent against other parties in *Encyclopaedia Britannica, Inc. v. Alpine Electronics of America, Inc., et al.*, Case No. 05-CA-359 (LY) (W.D. Tex). Britannica added the '018 Patent to that case and initiated a second case against these parties asserting '437 Patent.

issues now before the case proceeds to full-blown discovery. The pertinent facts are undisputed and apparent from the public record. Furthermore, granting this motion for summary judgment will completely resolve the case. At a minimum, determining the true effective filing date of the Patents-in-Suit is an essential first step that will bear on the proper construction of the claims and define the scope of the prior art. ²

UNDISPUTED FACTS IN THE PUBLIC RECORD

- **The Patents-in-Suit claim priority to the filing date of the '671 Patent's application ("the '917 Application") through the '955 Application.** The purported chain of priority for the asserted patents is:



(Statement Of Facts In Support Of Defendants' Motion For Summary Judgment Of Invalidity And An Order Setting The Effective Filing Date Of U.S. Patents 7,051,018 And 7,082,437 at 1-5, hereinafter "SOF.")

² *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (claims are construed as they would be understood by one of ordinary skill in the art as of the patent's effective filing date); *Schering Corp. v. Amgen, Inc.*, 18 F. Supp. 372, 380 (D. Del. 1998) (same); *Racing Strollers, Inc. v. TRI Indus., Inc.*, 878 F.2d 1418, 1422 (Fed. Cir. 1989) (the filing date is relevant to determining what is prior art).

- **The '955 Application was incomplete when deposited with the Patent Office.** Britannica deposited the '955 Application without one of its pages, the required declarations and oaths, or filing fees. (SOF ¶ 7; Declaration of Alison Aubry Richards (hereinafter "Richards Decl."), Ex. 5 at 2)
- **The Patent Office did not award the '955 Application a filing date.** The Patent Office sent Britannica a Notice of Incomplete Application on September 14, 1993. (SOF ¶ 8; Richards Decl., Ex. 5 at 7.) On October 29, 1993, Britannica submitted a Petition for Granting a Filing Date, but the Patent Office refused to grant the Petition and maintained that the '955 Application was incomplete as filed because it was missing one or more pages of the specification. (SOF ¶¶ 10-11; Richards Decl., Ex. 5 at 8-9; 20-21.) The Patent Office gave Britannica two months to respond, and two options to pursue, stating that either option would entitle Britannica to a filing date. (SOF ¶¶ 12-13; Richards Decl., Ex. 5 at 20-21.) Britannica failed to exercise either option, and the application went abandoned, on March 23, 1995, because it "did not comprise a complete application." (SOF ¶ 19; Richards Decl., Ex. 5 at 26.).
- **The '955 Application made no reference to the '917 Application before it went abandoned.**³ (SOF ¶ 6, Richards Decl., Ex. 5.)
- **Britannica did not deposit the '955 Application with the Patent Office before the '917 Application issued as the '671 patent.** The Patent Office issued the '671 Patent on August 31, 1993. (SOF ¶ 20; Richards Decl., Ex. 8.) On the same day, Britannica deposited the '955 Application. (SOF ¶ 21; Richards Decl., Ex. 10.)
- **The foreign counterpart to the '671 Patent was published in 1991, and discloses the entire subject matter of the '671 Patent.** International Application Number PCT/US90/06098 was published under International Publication Number WO 91/06916 (hereinafter "Britannica's Published Application") on May 16, 1991. (SOF ¶ 22; Richards Decl., Ex. 9.) The written description of Britannica's Published Application discloses identical subject matter, as well as some additional subject matter, as the written description of the '671 Patent. (SOF ¶ 23; Richards Decl., Exs. 8 and 9.)

ARGUMENT

Summary judgment is appropriate when the moving party shows that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ.

³ The file history for the '955 Application available from the Patent Office is incomplete because it does not include a copy of the original application in accordance with 37 C.F.R. § 1.53(b) (1993), which requires the Patent Office to return or dispose of an application if the applicant fails to correct the application. Nevertheless, the public record contains no evidence that Britannica filed an invention declaration claiming priority from an earlier application. (SOF ¶ 7; Richards Decl., Ex. 5.)

P. 56(c); *Avia Group Int'l Inc. v. L.A. Gear Calif., Inc.*, 853 F.2d 1557, 1560-61 (Fed. Cir. 1988); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Here, the undisputed facts available in the public record show that the effective filing date of the Patents-in-Suit as a matter of law, is no earlier than February 28, 1994. In addition, Britannica's own patent application, published on May 16, 1991—more than one year before the February 28, 1994 effective filing date—anticipates the claims of the Patents-in-Suit. As a result, the Court should enter summary judgment on both points, which will completely resolve this case.

I. The Court Should Enter Summary Judgment That The Effective Filing Date Of The Patents-In-Suit Is No Earlier Than February 28, 1994.

The effective filing date of a patent application is typically the date on which the applicant filed the patent application. 35 U.S.C. § 120 (1984). In certain specific circumstances, however, an application may claim the benefit of an earlier date, on which another patent application was filed. *Id.*; 37 C.F.R. § 1.78 (1993). Specifically, an application may claim “priority” to the filing date of another patent application only if it (1) meets all the requirement of 35 U.S.C. § 112; (2) has at least one inventor in common with the earlier application; (3) explicitly claims priority to the earlier application; and (4) is filed before the earlier application is patented or terminated—i.e., the patent application must be co-pending with the earlier application. 35 U.S.C. § 120; 37 C.F.R. § 1.78. Rule 78 further explains the requirements for a proper application to which an applicant may claim priority:

[T]he prior application must be (1) complete as set forth in §1.51, or (2) entitled to a filing date set forth in §1.53(b) and include the basic filing fee set forth in §1.16, or (3) entitled to a filing date as set forth §1.53(b) and have paid therein the processing and retention fee set forth in §1.21(l) within the time period set forth in §1.53(d).

37 C.F.R. § 1.78. This is a **statutory** requirement, and as such, an applicant must strictly comply with the terms of 35 U.S.C. § 120 and the regulation interpreting this section, 37 C.F.R. § 1.78,

to obtain the benefit of an earlier filing date. *Racing Strollers*, 878 F.2d at 1421; *see also BlackLight Power, Inc. v. Rogan*, 295 F.3d 1269, 1272 (Fed. Cir. 2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)).

Whether an application may claim priority to an earlier-filed application is an issue of law, that depends on underlying facts. *See Go Med. Indus. Pty., Ltd. v. Inmed Corp.*, 471 F.3d 1264, 1271-72 (Fed. Cir. 2006) (“Whether a patent is entitled to an earlier priority date is also reviewed without deference.”); *In re Daniels*, 144 F.3d 1452, 1455-56 (Fed. Cir. 1998). Where, as here, the underlying facts are undisputed, the issue of priority collapses into a question of law that is ripe for adjudication on summary judgment. *See Broadcast Innovation, L.L.C. v. Commc’ns, Inc.*, 420 F.3d 1364, 1366 (Fed. Cir. 2005).

The effective filing date of the Patents-in-Suit is no earlier than February 28, 1994 for at least four reasons: (A) the Patent Office determined that the ‘955 Application (to which the Patents-in-Suit claim priority) was incomplete and refused to award the application a filing date; (B) Britannica failed to pay the filing fee for the ‘955 Application, as required by 37 C.F.R. § 1.78(a); (C) the ‘955 Application failed to reference the earlier ‘917 Application or expressly make a claim of priority thereto; and (D) the ‘955 Application does not comply with the statutory deadline for filing a continuation application because Britannica did not file it “before” the ‘917 Application issued as the ‘671 Patent.

A. The Incomplete ‘955 Application Was Not Entitled To A Filing Date.

On September 14, 1993, the Patent Office determined that the ‘955 Application “did not comprise a complete application” as received and thus was not entitled to a filing date. (SOF ¶ 19; Richards Decl., Ex. 5 at 26.) The Patent Office notified Britannica that it assigned no filing date, and instructed Britannica on the two ways to remedy the situation. Britannica never

even attempted to remedy the Patent Office's determination that the '955 Application was not entitled to a filing date. (SOF ¶¶ 16-17; Richards Decl., Ex. 5 at 1-26.)

The Patent Office's no-filing-date determination has important implications for the Patents-in-Suit, which claim priority to the '955 Application. In order for an application to claim the benefit of the filing date of a prior application, the prior application itself "must be . . . [e]ntitled to a filing date." 37 C.F.R. § 1.78 (1993) (emphasis added). Because the '955 Application was never entitled to a filing date, it does not qualify as an application to which the Patents-in-Suit may claim priority. Therefore, the effective filing date of the Patents-in-Suit is no earlier than February 28, 1994 as a matter of law. (SOF ¶ 18, Richards Decl., Exs. 6-7.)

B. Britannica Never Paid The Filing Fee For The '955 Application.

Also on September 14, 1993, the Patent Office issued a "Notice of Missing Parts" for the '955 Application. This communication notified Britannica that the '955 Application was missing, *inter alia*, "[t]he statutory basic filing fee." (SOF ¶ 7-8; Richards Decl., Ex. 5 at 2, 7.) But Britannica never paid the filing fee for the '955 Application, and the Notice of Abandonment issued March 23, 1995 plainly shows this failure, stating that "[t]he \$0 fee submitted with the application" would be refunded. (SOF ¶ 19; Richards Decl., Ex. 5 at 26.)

In order for an application to claim the benefit of the filing date of a prior application, "the prior application must be (1) complete as set forth in §1.51 [which requires payment of the statutory filing fee],⁴ or (2) entitled to a filing date set forth in §1.53(b) and **include the basic filing fee** set forth in §1.16,⁵ or (3) entitled to a filing date as set forth §1.53(b) and have paid

⁴ Specifically, 37 C.F.R. § 1.51(a)(4)(1993) requires payment of "[t]he prescribed filing fee" to comprise a complete application.

⁵ 37 C.F.R. § 1.16 (1993) provides the amount in U.S. currency for applicable filing fees.

therein the processing and retention fee set forth in §1.21(l)⁶ within the time period set forth in §1.53(d).” 37 C.F.R. § 1.78 (July 1993) (emphasis added). Because Britannica paid neither the filing fee nor a processing and retention fee for the '955 Application, it does not qualify as an application to which the Patents-in-Suit may claim priority. Therefore, the effective filing date of the Patents-in-Suit is no earlier than February 28, 1994 as a matter of law. (SOF ¶ 18, Richards Decl., Exs. 6-7.)

II. In No Event Can the Patents-In-Suit Claim A Priority Date Earlier Than August 31, 1993.

Even if we assume that the '955 Application was entitled to a filing date and that Britannica paid the filing fee—neither of which are accurate, as discussed above—the Patents-In-Suit still cannot claim priority to the '917 Application for two additional independent reasons: the '955 Application fails to reference the '917 Application or make any express claim of priority to the '917 Application and the '955 Application was never co-pendent with the '917 Application. For these two reasons, the priority date of the Patents-In-Suit cannot, in any event, be any earlier than the date that Britannica deposited the '955 Application, August 31, 1993.

A. The '955 Application Fails To Reference The '917 Application Or Make An Express Claim Of Priority Thereto.

To claim priority under 35 U.S.C. § 120, the continuation application “must contain or be amended to contain in the first sentence of the specification following the title a reference to such prior application . . . and indicating the relationship of the applications.” 35 U.S.C. § 120; 37 C.F.R. § 1.78 (July 1993). An applicant who seeks the benefit of an earlier filing date must explicitly refer to the earlier application and claim priority to it in his application 35 U.S.C.

⁶ 37 C.F.R. § 1.21(l) (1993) provides the fee amount “[f]or processing and retaining any application abandoned pursuant to §1.53(d) unless the required basic filing fee has been paid.” The record indicates that Britannica did not pay this fee. (SOF ¶¶ 7-8, 19, Richards Decl., Ex 5 at 2, 7, and 26).

¶ 120. An applicant who fails to include a specific reference to an earlier-filed application waives the benefits of the earlier priority date. *See, e.g., Nilssen v. Osram Sylvania, Inc.*, 440 F. Supp. 2d 884, 907-908 (N.D. Ill. 2006) (noting that a claim of priority was “false because the cross-reference requirement was not satisfied.”); *see also In re Costello*, 717 F.2d 1346, 1348 (Fed. Cir. 1983); *Sampson v. Ampex Corp.*, 463 F.2d 1042, 1045 (2d Cir. 1972).

The ‘955 Application neither referenced the ‘917 Application expressly nor claimed priority to it. (SOF ¶ 6; Richards Decl., Ex. 5.) This failure legally prevents the effective filing dates of the Patents-in-Suit from being any earlier than August 31, 1993, the deposit date of the ‘955 Application.

B. The ‘955 Application Was Not Co-Pendent With The ‘917 Application.

To be entitled to the priority date of an earlier-filed application, the applications must be “co-pendent.” *Baxter Int’l, Inc. v. McGraw, Inc.*, 149 F.3d 1321, 1333 (Fed. Cir. 1998). In this case, the ‘955 Application was not co-pendent with the ‘917 Application. Even if Britannica had succeeded in obtaining a filing date of August 31, 1993, the ‘917 Application was no longer “pending” on that date because the ‘917 Application issued as the ‘617 Patent on August 31, 1993. (SOF ¶¶ 20-21; Richards Decl., Exs. 8 and 10.)

A continuation application must be “filed before the patenting . . . on the first application.” 35 U.S.C. § 120 (emphasis added). The plain meaning of “before” is that one event must be prior to, and not simultaneous with, another event. *Webster’s II New College Dictionary* 99 (2001 ed.) (“Before” is defined as “previous in time” or “[i]n advance of the time when”); *see also Smith v. United States*, 508 U.S. 223 (1993) (words in a statute are given their

MPRP § 201.11
says otherwise.
this day is OK.

“ordinary or natural meaning”).⁷ In the case of the ‘955 Application, Britannica waited to deposit the ‘955 Application with the Patent Office until the day the ‘917 Application issued as the ‘671 Patent, even though it had received notice of allowability nearly four months earlier.⁸ (SOF ¶¶ 20-21; Richards Decl., Exs. 8 and 10.) Because Britannica failed to deposit the ‘955 Application before the ‘671 Patent issued, the Patents-in-Suit cannot have effective dates before August 31, 1993, the deposit date of the ‘955 Application.

III. The Court Should Enter Summary Judgment That The Claims Of The Patent-In-Suit Are Invalid Because Britannica’s Own Prior Art Anticipates Them.

A defendant must prove patent invalidity by clear and convincing evidence. *Eli Lilly & Co. v. Barr Labs., Inc.*, 251 F.3d 955, 962 (Fed. Cir. 2001). A person is not entitled to a patent if “the invention was patented or described in a printed publication more than one year prior to the date of the application for patent in the United States.” 35 U.S.C. § 102(b). A published prior art reference that discloses every element of the asserted claims anticipates the claims and

⁷ The Patent Act is subject to the same rules of statutory interpretation that courts apply to other federal statutes. *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1755 (2007). The Supreme Court has interpreted “before” and its synonym “prior to” as excluding events occurring on the same day. *United States v. Locke*, 471 U.S. 84 (1985). In *Locke*, the Supreme Court interpreted the Federal Land Policy and Management Act, which required that filings for mining claims be made “prior to December 31 of each year,” to mean that a December 31 filing was untimely. 471 U.S. at 95-96 (noting that “prior to” and “before” generally have the same statutory interpretation, while “on or before” is “a phrase with obviously different substantive content.”); compare *VLT, Inc. v. Artesyn Techs., Inc.*, 238 F. Supp. 2d 339 (D. Mass. 2003) (for one event to be “prior to” or “before” another, the two events cannot occur simultaneously); *Provident Life and Cas. Ins. Co. v. Ginther*, No. 96-CV-0315E(H), 1997 WL 9779, *1 (W.D.N.Y. Jan. 3, 1997) (stating that a motion to dismiss filed simultaneously with an answer is not filed “before” and does not satisfy Rule 12(b)(6)) (collecting cases).

⁸ Although MPEP § 201.11 states that “it is sufficient . . . if the later-filed application is filed on the same date, or before the date that the patent issues on the prior application[.]” this language does not control because it is in direct conflict with Section 120. See *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1180 n.10 (Fed. Cir. 1995) (“While the MPEP does not have the force of law, it is entitled to judicial notice as an official interpretation of statutes or regulations as long as it is not in conflict therewith.”); *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1425 (Fed. Cir. 1988) (“[T]he courts are the final authorities on issues of statutory construction. They must reject administrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.” (quoting *Federal Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981))).

renders them invalid under 35 U.S.C. § 102(b). *Telemac Cellular Corp. v. Topp Telecom, Inc.*, 247 F.3d 1316, 1327 (Fed. Cir. 2001).

Britannica's Published Application a foreign counterpart to the '671 Patent was published on May 16, 1991. (SOF ¶ 22; Richards Decl., Ex. 9.) Britannica's Published Application qualifies as prior art to the Patents-in-Suit under section 102(b) unless the effective filing date of these patents is before May 16, 1992. As discussed above, the undisputed evidence establishes that the effective filing date of the Patents-in-Suit is at best no earlier than August 31, 1993—more than two years after Britannica's Published Application was published.

Britannica's Published Application is a continuation of and claims priority to the '671 Patent, and its written description discloses the entire subject matter of the '671 Patent. (SOF ¶ 23; Richards Decl., Exs. 8-9.) The '018 and '437 patents claim priority to the '671 Patent, and their written descriptions are identical to the '671 patent. (SOF ¶¶ 1-3; Richards Decl., Exs. 1-2.) Thus, both the Published Application and the '018 and '437 patents have the same written description — i.e. the same written description as the '671 Patent. As a result, the identical written description of Britannica's Published Application must anticipate the Patents-in-Suit if the Published Application is Section 102(b) prior art to the Patents-in-Suit, as indeed it is because the effective filing date of the Patents-in-Suit is after October 26, 1989. Therefore, the Court should enter summary judgment of invalidity. *Go Med. Indus.*, 471 F.3d at 1271-72 (holding that where a continuation application is not entitled to claim the priority date of an earlier application and is anticipated by prior art, summary judgment of invalidity is appropriate).

CONCLUSION AND PRAYER

For the foregoing reasons, Defendants respectfully ask the Court to enter summary judgment that the effective filing date of U.S. Patents No. 7,051,018 and 7,082,437 is no earlier than February 28, 1994, and that the Patents-in-Suit are invalid.

Respectfully submitted,

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with permission

Eva C. Ramos

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of October, 2007, I am serving the foregoing document by certified mail, return receipt requested (Motion and Appendix) and by electronic mail (Motion only) to the following counsel of record:

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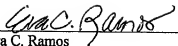
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Eva C. Ramos

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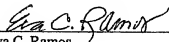
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